Robin ak Bandang & Ors v Public Prosecutor

HIGH COURT (ALOR SETAR) — CRIMINAL APPEAL NO 42-13 OF 1998
KN SEGARA J
26 SEPTEMBER 1998

Criminal Procedure *— Jurisdiction of court — Offences committed by members of Armed Forces — Whether mandatory for court-martial to try offence when committed by person subject to service law — Whether Public Prosecutor has discretion to institute proceedings for offence in the appropriate civil criminal court having jurisdiction to hear the same*

The appellants were members of the Armed Forces and were subject to service law under the Armed Forces Act 1972. They were charged for the offence of rape under s 376 of the Penal Code (FMS Cap 45). The sessions court judge held that it had jurisdiction to try the appellants. The appellants appealed. Counsel for the appellants submitted that it was mandatory for a court-martial to try the offence of rape when committed by a person subject to service law.

Held, dismissing the appeal:

The Attorney General has no power under art 145(3) of the Federal Constitution to institute or conduct any proceedings for an offence before a court-martial. Therefore, when a crime such as rape has been allegedly committed by the appellants, the Attorney General, as Public Prosecutor, had the discretion to institute proceedings for an offence under s 376 of the Penal Code, in the appropriate civil criminal court having jurisdiction to hear the same, that is, the sessions court in the exercise of its criminal jurisdiction under s 63 of the Subordinate Courts Act 1948.

Furthermore, it was both outrageous and obnoxious to common sense, as well as repugnant to our criminal justice system administered under the common law, to hold that a civil criminal court had no jurisdiction to try persons subject to service law for the offence of rape and that they should only be tried by a court-martial (see pp 631F–G, I and 632A).

[Bahasa Malaysia summary

Perayu-perayu merupakan ahli-ahli Angkatan Tentera dan adalah tertakluk kepada undang-undang perkhidmatan di bawah Akta Angkatan Tentera 1972. Mereka telah dipertuduhkan dengan kesalahan merogol di bawah s 376 Kanun Keseksaan (NMB Bab 45). Hakim mahkamah sesyen memutuskan bahawa ia mempunyai bidang kuasa untuk membicarakan perayu-perayu. Perayu-perayu membuat rayuan. Peguam perayu-perayu menghujahkan bahawa adalah mandatori untuk sebuah mahkamah tentera untuk membicarakan

kesalahan merogol apabila dilakukan oleh orang yang tertakluk kepada undang-undang perkhidmatan. A

Diputuskan, menolak rayuan:

Peguam Negara tidak berkuasa di bawah perkara 145(3) Perlembagaan Persekutuan untuk memulakan atau menjalankan apa-apa prosiding untuk kesalahan di hadapan mahkamah tentera. Maka, apabila suatu kesalahan seperti rogol dikatakan telah dilakukan oleh perayu-perayu, Peguam Negara, sebagai Pendakwa Raya, mempunyai budi bicara untuk memulakan prosiding untuk satu kesalahan di bawah s 376 Kanun Keseksaan, di mahkamah jenayah sivil yang wajar yang mempunyai bidang kuasa untuk mendengar yang sama, iaitu mahkamah sesyen dalam pelaksanaan bidang kuasa jenayahnya di bawah s 63 Akta Mahkamah Rendah 1948. B C

Tambahan pula, adalah kedua-dua melampau dan menjelikkan kepada akal, serta bertentangan dengan sistem keadilan jenayah kita yang ditadbirkan di bawah common law, untuk memutuskan bahawa sebuah mahkamah jenayah yang sivil tidak mempunyai bidang kuasa untuk membicarakan orang yang tertakluk kepada undang-undang perkhdimatan untuk kesalahan rogol dan bahawa mereka hanya boleh dibicarakan oleh mahkamah tentera (lihat ms 631F–G, I dan 632A).] D E

Notes

For cases on jurisdiction of court, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1497–1607. F

Case referred to

Joginder Singh v State of Himachal Pradesh 1971 SCC (Cri) 269 (refd)

Legislation referred to

Armed Forces Act 1972 ss 88(4), 93, 95 G
Federal Constitution art 145(3)
Penal Code (FMS Cap 45) s 376
Subordinate Courts Act 1948 s 63

G Ravishankar (*Nijar Kumar Netto & Partners*) for the appellants.
Wan Norzanuar (Deputy Public Prosecutor) for the respondent. H

KN Segara J: The three appellants herein appealed against the order made by the learned sessions court judge on 17 June 1998 that the sessions court had jurisdiction to try the three appellants for the offence of rape under s 376 Penal Code.

It is not disputed that the three appellants are members of the Armed Forces and are subject to service law under the Armed Forces Act 1972. I

A However, there is no evidence that the three appellants had been charged for any service offence under Part V of the Armed Forces Act 1972 (ss 38–88) in connection with the police reports made by the complainants on 27 April 1998. There is no evidence that the three appellants have been arrested under s 93 of the Armed Forces Act 1972 and were in military custody at any time for investigation by the Provost Marshal. There is also no evidence B that the Provost Marshal had requested the police to hand over the three appellants to their custody for investigation. There is also no evidence of any investigation of any charge/s against the three appellants by their commanding officer/s under s 95 of the Armed Forces Act 1972 and a decision made as to whether the charge/s be dealt with summarily or by a C court-martial. In short, there is no evidence of any steps taken by the military authorities against the three appellants under the provisions of the Armed Porces Act 1972 consequent upon their arrest by the police on 29 April 1998.

Under service law, rape would be an offence under s 88 of the Armed D Forces Act 1972. Although rape is an offence under s 88 of the Armed Forces Act 1972, it is to be noted that no person shall be tried for that offence by a court-martial unless when he committed the offence he was on active service or serving outside the Federation (see s 88(4)). Pursuant to s 3 of the Armed Forces Act 1972, 'on active service' in relation to a force means that it is engaged in operations against an enemy, or is in a E country or territory outside the Federation for the preservation of life or property or is on military occupation of a foreign country, and in relation to a person means that he is serving in or with such a force which is on active service.

There could be a variety of circumstances which may influence the F decision of the military authorities as to whether the three appellants should be dealt under service law or not. The Attorney General has no power under art 145(3) of the Federal Constitution to institute or conduct any proceedings for an offence before a court-martial. Therefore, when a crime such as rape has been allegedly committed by the three appellants, the Attorney General, as Public Prosecutor, has the discretion to institute G proceeding for an offence under s 376 of the Penal Code, in the appropriate civil criminal court having jurisdiction to hear the same, that is, the sessions court in the exercise of its criminal jurisdiction under s 63 of the Subordinate Courts Act 1948.

The submission by learned counsel for the appellants that it is H mandatory for a court-martial to try the offence of rape when committed by a person subject to service law is neither supported by law nor case authority. The Indian case of *Joginder Singh v State of Himachal Pradesh* 1971 SCC (Cri) 269 is neither guidance nor authority for such a proposition. It is both outrageous and obnoxious to common sense, as well as repugnant to our criminal justice system administered under the common law, to I hold that a civil criminal court has no jurisdiction to try persons subject to service law for the offence of rape and that they should only be tried by a

court-martial. To make such a ruling and deny the Public Prosecutor his right to institute criminal proceedings in a civil criminal court against the appellants would run counter to the laws of this country and the public interest.

Appeal dismissed.

Reported by Loo Lai Mee